

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

In re BAYCOL PRODUCTS LITIGATION	:	MDL No. 1431
	:	(MJD/SRN)
This Document Relates to:	:	
	:	
<i>Patricia Cook, et al. v. Bayer Corp, et al.</i>	:	Case No. 05-0196
	:	

**MEMORANDUM IN SUPPORT OF DEFENDANTS’  
MOTION TO DISMISS**

Pursuant to Federal Rule of Civil Procedure 4(m), plaintiff William Chavanell should have served his complaint on defendants Bayer Corporation (“Bayer”) and SmithKline Beecham Corporation d/b/a GlaxoSmithKline (“GSK”) within 120 days of when he commenced this action in 2004. Because he has not served defendants, his case should be dismissed under Rule 12(b)(5) for insufficient service of process and also under Rule 41(b) for failure to prosecute.

**FACTS**

Twelve plaintiffs filed a joint complaint against Bayer and GSK on June 25, 2004, but Mr. Chavanell was not one of the twelve. *See* Complaint, Document 1 (filed W.D. La) (Ex. A). Those same twelve plaintiffs filed an amended complaint on December 3, 2004, only this time Mr. Chavanell was added as a plaintiff. *See* Amended Complaint, Document 6 (filed W.D. La.) (Ex. B). Although the second complaint was titled “Amended Complaint,” it was Mr. Chavanell’s first. *See id.* Thus, Mr. Chavanell should have served defendants on or before April 4, 2005. *See* Fed. R. Civ. P. 4(m) (requiring service within 120 days of filing complaint).

The Amended Complaint was never served on Bayer or GSK. *See* Amended Complaint (Ex. B) (omitting certificate of service); Docket for W.D. La. Case No. 2:04-cv-1353 (Ex. C) (same). In fact, Bayer was not served with either the Original or the Amended Complaint – plaintiff’s counsel acknowledged this and agreed to serve Bayer with the Amended Complaint, but never did so. *See* Letter of Dec. 29, 2004 (Ex. D) (documenting agreement to serve Amended Complaint and Summons or Waiver). GSK was served with, and answered, only the Original Complaint, which did not name Mr. Chavanell as a plaintiff. *See* Letter of Nov. 30, 2004 (Ex. E) (enclosing Original Complaint and requesting waiver of service of summons); Answer of GSK to Plaintiffs’ Original Complaint (Ex. F).<sup>1</sup> On July 13, 2005, the claims of the original twelve plaintiffs, but not Mr. Chavanell’s, were dismissed with prejudice. *See* Order of July 13, 2005 (Ex. G).

Mr. Chavanell’s case, not having been dismissed, has been languishing on this Court’s docket with no action for more than three years. Pursuant to Rules 4(m) and 41(b), the Court should dismiss his case without prejudice. *See Advanced Therapeutics of Wis., Inc. v. Augustine Med. Inc.*, No. 07-1659, 2007 WL 2343662 (D. Minn. Aug. 13, 2007) (dismissal without prejudice pursuant to Rule 4(m) and for failure to prosecute); *Braxton v. Bi-State Dev. Agency*, 728 F.2d 1105, 1007 (8th Cir. 1984) (dismissing case without prejudice under Rules 4(m) and 41(b) when there has been no service); *Roberts*

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<sup>1</sup> This Court’s docket erroneously states that GSK answered the Amended Complaint in this case. *Compare* Docket for D. Minn. Case No. 05-cv-0196 *with* Docket for W.D. La. Case No. 2:04-cv-1353 (Ex. C).

*v. Mo. Div. of Employment*, 636 F.2d 249, 250 (8th Cir. 1980) (upholding dismissal where defendant was never served).

### CONCLUSION

For the foregoing reasons, this Court should dismiss William Chavanell's case without prejudice.

Dated: March 26, 2008

Respectfully submitted,

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